

STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	:	
On Its Own Motion	:	
-vs-	:	02-0067
Northern Illinois Gas Company	:	
d/b/a NICOR Gas Company	:	
	:	
Proceeding to review Rider 5, Gas cost,	:	
pursuant to Section 9-244(c) of the Public	:	
Utilities Act.	:	

**REPLY OF THE STAFF OF THE ILLINOIS COMMERCE COMMISSION  
TO THE AMENDED RESPONSE OF NORTHERN ILLINOIS GAS COMPANY TO THE  
MOTION FOR PROTECTIVE ORDER OF CITIZENS UTILITY BOARD**

NOW COMES the Staff of the Illinois Commerce Commission ("Staff"), through its attorneys, and files its Reply to the Amended Response of Northern Illinois Gas Company ("Nicor") to the Motion for Protective Order of Citizens Utility Board ("Response").

**I. INTRODUCTION**

On June 27, 2002 Citizens Utility Board ("CUB") filed the Motion for Protective Order ("Motion") seeking to have the Illinois Commerce Commission ("Commission") enter a protective order to preclude Nicor personnel from having access to a fourteen page facsimile document ("Fax") that CUB received on June 21, 2002. On July 8, 2002, Nicor filed its Response to CUB's motion. In the Response, Nicor provides three main arguments in opposition to CUB's motion. Nicor claims that CUB's proposal for a protective order is against sound public policy, legally deficient, and unnecessary. For the reasons set forth below, Nicor's arguments are unpersuasive. Staff supports the

entry of a protective order.

## II. PUBLIC POLICY

The doctrine of informer's privilege has a long history throughout English common law. Elizabeth Dole v. Local 1942 IBEW, AFL-CIO, 870 F.2d 368, 372 (7<sup>th</sup> Cir. 1989) (citation omitted). Its purpose is the furtherance and protection of the public interest in effective law enforcement. Id., citing Roviaro v. United States, 353 U.S. 53, 1 L.Ed. 2d 639, 77 S.Ct. 623 (1957). "The privilege recognizes the responsibility of citizens to cooperate with law enforcement officials and, by providing anonymity, encourages them to assume this responsibility." Dole, at 372. Underlying the doctrine is the common-sense notion that individuals who offer their assistance to a government investigation may later be targeted for reprisal from those upset by the investigation. See Id. Well-intentioned citizens may hesitate or decline to assist the government if the threat of reprisal exists. Courts have found that the "most effective means of protection, and by derivation the most effective means of fostering citizen cooperation, is bestowing anonymity on the informant, thus maintaining the status of the informant's strategic position and also encouraging others similarly situated who have not yet offered their assistance." Dole, at 372, citations omitted.

The public policy upon which the doctrine is based certainly applies to the instant proceeding. The subject of the proposed protective order is a Fax, which, by all appearances, was sent by a Nicor employee in an attempt to assist the Commission's review of Nicor's performance based rates ("PBR"). As described in CUB's Motion,

...The information at issue consists of materials submitted by a Nicor employee, who specifically requests that CUB limit use of the fax to obtaining discovery, and that the fax itself not become public. The employee specifically states that his or her position at Nicor will be

compromised if Nicor sees the material. Review of the material indicates that if Nicor sees any of it, the company may be able to determine the identity of the employee.

Motion for Protective Order, pp. 1-2.

Upon review of the Fax, it is apparent that the author's concern for anonymity is valid. If this document is released to Nicor, the informant may be subject to retaliation. In order to protect the informant, the Fax should be treated as privileged and should be afforded the protection of a protective order.

"When asserting the privilege the government need not make a threshold showing that reprisal or retaliation is likely, because of the significant policy consideration behind the privilege, as well as the difficulty of such proof. Rather, the government is granted the privilege as of right." Dole, at 372. A party opposing the privilege may only overcome it upon showing a need for the information outweighs the government's entitlement to the privilege. Id., at 373. The issue then becomes whether the party opposing the privilege has credible need for the information in order to defend itself in the action, and that need must be greater than the important policy consideration underlying the privilege. Id.

Nicor's stated need for the Fax is "that the contents of the Fax are potentially very relevant for the preparation of Nicor's case" and that "restricting Nicor's access to the Fax violates Nicor's due process rights..." Response, p. 7. However, because any additional evidence entered into the record will be based upon discovery, to which the Company will have full access, Nicor is in no way prejudiced by not having access to the Fax. The important policy consideration underlying the privilege clearly outweighs Nicor's purported "needs" on both accounts.

### III. LEGAL BASIS

The Illinois Commerce Commission is a governmental entity with investigatory powers and is authorized to enforce state law. See 220 ILCS 5/5-101 *et al.* and 5/10-101 *et al.* The Fax may lead to information that will assist the Commission in this review of Nicor's PBR. The Commission has an interest in assuring that citizens are able to cooperate with, provide information to, or otherwise assist the Commission without fear of reprisal.

Thus far, the parties and Staff have treated the Fax in a manner consistent with that of a privileged document. CUB served as a conduit through which the informant flowed its information to the Commission. Upon its receipt, CUB immediately filed a Motion for Protective Order, thus notifying the Commission of the Fax's existence and seeking the Commission's protection for the privileged document. It was only upon the approval of the Administrative Law Judge that the Fax was provided on a limited basis to Nicor's outside counsel and governmental entities. Under the current circumstances, continued protection of the Fax is both justified and necessary.

As stated above, the informer's privilege exists for the purpose of protecting the identity of informants in governmental investigations. Nicor will have a full and fair opportunity to respond to, rebut, cross-examine and brief any evidence which may be entered into the record of this case. Therefore, Nicor's due process rights will not be violated by the grant of the privilege in this instance. The Commission should invoke the privilege in order to effectuate the public policy of encouraging citizens' cooperation with law enforcement officials in government investigations. See Dole.

#### **IV. NECESSITY**

Nicor's argument, that because Illinois recognizes a cause of action for retaliatory discharge, the privilege is unnecessary to protect the informant, is inapposite. As discussed above, a the governmental entity does not need to make an affirmative showing that reprisal or retaliation is likely in order for the privilege to attach. Because of the significant policy consideration behind the privilege, as well as the difficulty of such proof, the government is granted the privilege as a right. Dole, p. 372. If the government need not show that retaliation is likely, then it follows that the government need not show that the informant has no possible means of redress in the event the informant is a victim of retaliation.

Nicor is correct when it states that the Commission must balance the competing interests of the parties. The privilege yields when the identification of the informant or of a communication is essential to a balanced measure of the issues and the fair administration of justice. Dole, p. 372. However, as discussed above, if the record is reopened, Nicor will have the same opportunity as every other party to the proceeding to provide testimony, issue discovery, cross-examine witnesses and brief the issues. Nicor has identified no viable need for the Fax. It is worth noting that Nicor's outside counsel has been given access to the Fax. The fair administration of justice requires that the informant's need for anonymity take precedence over Nicor's desire, without more, to know the contents of the Fax.

#### **V. CONFIDENTIAL TREATMENT**

Nicor suggests that that the Fax may "be based on attorney client privilege information or other confidential and proprietary Company information", and thus, Nicor

needs to evaluate the information to determine if confidential information has been disclosed or the privilege has been waived. Response, p.7. Staff strongly disagrees with Nicor's suggestions. As discussed at length above, the Fax has been treated in a manner consistent with a privileged document by Staff, CUB, and other governmental parties up to this point and should be so designated by the Commission in a Protective Order. By nature of its "privileged" designation, the Fax will enjoy certain protections similar to those of a confidential and proprietary document. At this time, these protections stem from the Fax's privileged designation rather than a specific claim for confidential treatment on the part of the Company. Indeed, Nicor has provided no credible basis for the designation of the Fax as confidential. Assuming arguendo, that the Commission chooses not to grant privileged status to the Fax, then the Fax should be made public in the absence of Nicor carrying its burden to show that the Fax contains confidential, proprietary, or trade secret data, information, or studies.

For the foregoing reasons, the Staff of the Illinois Commerce Commission respectfully requests that the Commission grant CUB's Motion and enter a Protective Order.

Respectfully submitted,

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